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No. 89-998

In The

Supreme Court of the United States

October Term, 1989

JAMES A. MITCHELL, JR.,

Petitioner,

v.

ASSOCIATED BUILDING CONTRACTORS OF N.W. OHIO, INC.
and
RUDOLPH/LIBBE INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in an action asserting intentional race discrimination in employment in violation of 42 U.S.C. section 1981, evidence of the employer's equal employment efforts and employment of minorities is relevant to show the absence of a discriminatory intent by the employer?

2. Whether this Court should review the opinion of a federal court of appeals on issues involving a motion for judgment notwithstanding the verdict, requests for instructions to the jury, a motion for a new trial, and admission of evidence, when the petition fails to state how the opinion conflicts with decisions of this Court or other federal courts of appeals, or decides an unsettled, important question of federal law?

LIST OF ALL PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were plaintiff-appellant James A. Mitchell, Jr., petitioner herein ("Mr. Mitchell" or "petitioner"), and defendant-appellee Rudolph/Libbe Inc., an Ohio corporation, respondent herein ("Rudolph/Libbe" or "respondent").

Pursuant to this Court's Rule 28.1, the Court is advised that Rudolph/Libbe is a wholly owned subsidiary of The Rudolph/Libbe Companies Inc., an Ohio corporation which owns a controlling interest in GEM Industrial Inc., Vista Development Inc., and Vista Capital Group Inc., all Ohio corporations, and Walbridge Inc., a Florida corporation.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the two opinions of the United States District Court for the Northern District of Ohio, Western Division, have not been reported, but are Appendix A and Appendices B and C, respectively, of the Petition for Writ of Certiorari.

STATUTE INVOLVED

42 U.S.C. section 1981 (1982) states as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Mr. Mitchell filed his Amended Complaint with the U. S. District Court for the Northern District of Ohio, Western Division, on July 11, 1984, containing a claim of racial discrimination in employment under 42 U.S.C. section 1981 against a number of defendants, including Rudolph/Libbe. Rudolph/Libbe filed an Answer denying Mr. Mitchell's allegations of racial discrimination and raising a number of affirmative defenses.

The district court granted Mr. Mitchell's motion to strike the words "and Title VII" from the Amended Complaint, noting that petitioner had failed to fulfill the administrative prerequisites to suit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 2000e *et seq.*, and later overruled Mr. Mitchell's motion to add a Title VII claim to the Amended Complaint.

At trial, Mr. Mitchell's claim was that his January, 1984, layoff by respondent and its failure later to re-hire him were racially motivated. (Petitioner's Appendix C, pp. 2C, 4C; Petitioner's Appendix A, p. 4A.) Even though Mr. Mitchell never showed "that less qualified white persons . . . were hired over him," the jury awarded $10,000 in compensatory damages and $200,000 in punitive damages. (Petitioner's Appendix A, p. 2A, 7A.) Rudolph/Libbe moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion for j.n.o.v. was granted as to the punitive damages award because the "record in this case is devoid of evidence of [respondent's] evil intent or callous, reckless or egregious disregard of [petitioner's] federal rights." (Petitioner's Appendix C, p. 4C.) The trial court also determined that the evidence was insufficient with regard to both lost wages and emotional distress to support the $10,000 compensatory damages award; the only evidence of mental distress was Mr. Mitchell's brief testimony, and the evidence of lost wages showed, at most, a loss of $1,504. Petitioner was ordered to notify the court of his acceptance of a remittitur of $8,496, resulting in a $1,504 award, or the motion for a new trial would be granted. (Petitioner's Appendix C, pp. 4C-6C.) Mr. Mitchell never

accepted the remittitur and the case was later scheduled for a second trial. (Petitioner's Appendix A, p. 2A.)

"At this [second] trial [petitioner] sought to base his entire claim on the evolution and use of a quota system." (Petitioner's Appendix A, p. 2A.) Mr. Mitchell asserted Rudolph/Libbe's "hiring of bricklayers was based on an unlawful quota system." (Petitioner's Appendix B, p. 2B.) Rudolph/Libbe denied using a quota. (Petitioner's Appendix A, p. 7A.)

> For example, there was ample evidence submitted by [Rudolph/Libbe's] President and by [Mr. Mitchell's] own witness, James Spencer, Director of the Hometown Plan, that defendant did not employ a quota system.

(Petitioner's Appendix B, pp. 2B-3B.) Rudolph/Libbe used evidence of equal employment opportunities for minorities to rebut the claim that it intentionally discriminated. (Petitioner's Appendix A, p. 7A.)

Some evidence at the second trial related to the Toledo Area Affirmative Action Program for the Construction Industry (the "Home Town Plan"), established by the federal Department of Labor "to improve minority participation in the skilled construction trades." (Petitioner's Appendix A, p. 9A.) As a Home Town Plan participant, Rudolph/Libbe "monitored its minority workforce, in order to participate in federal and government projects," using a 13 percent minority hiring goal. Respondent had no maximum quota for black or other minority workers, as Mr. Mitchell claimed. (Petitioner s Appendix A, pp. 7A-8A.) Rudolph/Libbe's evidence was that lack of work and the absence of job openings were

the reasons for the employment decisions made with regard to Mr. Mitchell. (Petitioner's Appendix A, p. 8A.)

After the second trial and a jury verdict and judgment in Rudolph/Libbe's favor, the trial court denied Mr. Mitchell's motions (1) for j.n.o.v. and (2) for a new trial, ruling that (1) the evidence did not support a single conclusion in petitioner's favor and (2) that the verdict was not against the clear weight of the evidence. (Petitioner's Appendix B, pp. 2B-4B.)

Mr. Mitchell appealed to the Sixth Circuit. The court of appeals held that the decision to grant a new trial or request the filing of a remittitur because of excessive damages was not an abuse of discretion. Petitioner's evidence relating to damages was "insufficient" and "extremely vague;" the $10,000 damage award "was not 'clearly within the reasonable range.' " (Petitioner's Appendix A, pp. 3A-5A.) The j.n.o.v. regarding punitive damages following the first trial was proper because in the absence of "egregious conduct or malice" to support punitive damages, there was no "evidence in the record to present a question of fact for the" jury. (Petitioner's Appendix A, pp. 6A-7A.)

The appeals court also agreed with the district court on the issues raised by the second trial. Denial of Mr. Mitchell's j.n.o.v. motion was correct because Rudolph/Libbe's evidence rebutting the claim of intentional race discrimination supported the jury's decision. (Petitioner's Appendix A, pp. 7A-8A.) Petitioner's jury instructions were properly denied because they did not differ significantly from those given and because Mr. Mitchell sought instructions arguing his case for him. (Petitioner's

Appendix A, p. 8A.) The Sixth Circuit upheld the exclusion of damages evidence predating the statute of limitations, since no damages award could extend to a time before the limitations period. (Petitioner's Appendix A, pp. 8A-9A.) The decision of the district court was affirmed. (Petitioner's Appendix A, p. 10A.)

Petitioner seeks review of the Sixth Circuit's decision by this Court.

SUMMARY OF ARGUMENT

The evidence does not support petitioner's argument that he has been injured by any "racial quota." To the contrary petitioner, as a minority person, should be benefitted by the equal employment opportunity plan and, absent any injury, does not even have standing to assert a claim related to the plan. Evidence relating to the plan assists in rebutting the assertion that respondent intentionally discriminated.

The appeals court applied accepted standards in deciding the motion, jury instructions, and evidence issues petitioner raises. None of the considerations governing review on certiorari apply here.

The petition for writ of certiorari should be denied.

ARGUMENT

1. Petitioner Has Not Been Harmed by Any Claimed "Racial Quota."

At the heart of the Petition for Writ of Certiorari is Rudolph/Libbe's participation in the Home Town Plan. Mr. Mitchell, a black man, contends that the Home Town Plan has fixed quotas which prevent minority employment. (Petition for Writ of Certiorari, pp. 2-3.) Petitioner claims that respondent has a 13 percent maximum minority hiring quota which denied him employment opportunities because he was black. (Petitioner's Appendix A, pp. 2A, 7A.) Rudolph/Libbe presented evidence contrary to these assertions. Respondent showed its employment decisions regarding petitioner were based on the absence of job openings or due to a lack of work. (Petitioner's Appendix A, p. 8A.) Rudolph/Libbe responded to the argument that its participation in the Home Town Plan was unlawful or discriminatory by showing that it was simply "monitor[ing] its minority workforce, in order to participate in federal and government projects" (Petitioner's Appendix A, p. 8A); the Home Town Plan was part of a federal government effort to assist "minority participation in the skilled construction trades." (Petitioner's Appendix A, p. 9A.) Rudolph/Libbe's evidence concerning the Home Town Plan was part of its proof which "rebutted [petitioner's] assertions of intentional discrimination." (Petitioner's Appendix A, p. 7A.)

This case is different from *Connecticut v. Teal*, 457 U.S. 440 (1982), a Title VII discriminatory impact case cited in the Petition for Writ of Certiorari. There, the petitioners sought to justify a discriminatory impact against the

respondent based on the petitioners' favorable treatment of other members of the respondent's racial group. *Teal*, 457 U.S. at 454. Here, however, evidence of Rudolph/Libbe's equal employment opportunities is relevant on the issue of discriminatory intent under Section 1981, as this Court recognized in *Teal*:

> The Court has stated that a nondiscriminatory "bottom line" and an employer's good faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action has been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978). See also *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977). But resolution of the factual question of intent is not what is in issue in this case.

Teal, 437 U.S. at 454. Rudolph/Libbe's evidence was relevant to show the absence of an intent to discriminate.

There is no evidence to support Mr. Mitchell's suggestion that the Home Town Plan has been used as a ceiling to prevent minority hirings by Rudolph/Libbe. (Petitioner's Appendix A, p. 7A.) The Home Town Plan was instituted by the Department of Labor as an effort to aid minorities to participate in the skilled construction trades. (Petitioner's Appendix A, p. 9A.) Participation in the Plan permits a contractor "to participate in federal and government projects." (Petitioner's Appendix A, p. 8A.) If a contractor is not meeting the goals of the Home

Town Plan, that contractor might be dropped from participation in the Home Town Plan.

2. Absent Injury, Petitioner Lacks Standing to Challenge the Employment Plan.

Having established that the Home Town Plan is not a ceiling which prevents minority employment and, specifically, that Rudolph/Libbe has no maximum quota for minority employment, the issue of Mr. Mitchell's standing is raised. Before a federal court will accept jurisdiction of an action, a case or controversy must be established within the meaning of Article III. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The plaintiff must have standing, in order to establish a case or controversy. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968).

The constitutional analysis of standing consists of three parts. First, a plaintiff must allege and prove a "distinct and palpable" injury. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Second, there must be a causal connection between the injury and the defendant's alleged conduct. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Third, assuming it is appropriate for the court to exercise its remedial powers, there must be a substantial probability that the claimed injury will be redressed by the action sought by the plaintiff. *Simon*, 426 U.S. at 26.

Here, there is simply no causal connection between the Home Town Plan, which seeks affirmatively to assist

minorities in their employment in the skilled construction trades, and petitioner's alleged injury, supposedly resulting from his exclusion from employment as a bricklayer. This is not a case like *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), in which the male petitioner was, at least arguably, adversely affected by an affirmative action plan in favor of females. Mr. Mitchell can simply have no complaint about the Home Town Plan, which will assist, rather than deter, his efforts as a minority person to gain employment in the skilled construction trades in the Toledo, Ohio, area.

3. A Writ Should Not Issue, Because the Appeals Court Applied Accepted Legal Standards.

a. *Judgment n.o.v.*

Petitioner's first "argument" is that the Home Town Plan is a quota system constituting malicious conduct, upon which the jury could award punitive damages; apparently, petitioner considers the j.n.o.v. on punitive damages to have been entered erroneously. (Petition for Writ of Certiorari, pp. 18-19.) There is no reason for this court to issue a writ of certiorari on this issue, since the Sixth Circuit applied accepted legal standards in deciding this issue. None of the considerations governing review on certiorari, under this Court's Rule 17, apply to this issue.

Punitive damages were awarded by the jury at the first trial, after which the district court granted respondent's motion for j.n.o.v. as to punitive damages. (Petitioner's Appendix A, p. 2A.) In reviewing the decision on

that motion for j.n.o.v., the Sixth Circuit applied the standard of *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The question is whether there is insufficient evidence in the record to present a question of fact for the jury's consideration; the question is one of law for a *de novo* determination by the reviewing court. *Morelock*, 586 F.2d at 1104-05. (Petitioner's Appendix A, p. 6A.) The Court of Appeals decided there was no evidence to support the punitive damages award:

> Upon careful review of the evidence *presented at the first trial*, the district court properly determined that the evidence could not support imposition of punitive damages. Evidence of Rudolph/Libbe's hiring practices demonstrated, at worst, a hiring system based on utilization of previously employed individuals. Recognizing that such a system, with a predominantly white workforce, might perpetuate the predominantly white workforce, Rudolph/Libbe used a minority hiring goal of 13 percent on all of its hiring, for both federal and nonfederal projects. Mitchell never once alleged or proved that less qualified white persons, or persons with a lesser connection to Rudolph/Libbe, were hired over him. The proportion established was higher than the proportion of minority bricklayers in the Toledo area. There was no showing of egregious conduct or malice which would permit the award of punitive damages.

(Petitioner's Appendix A, pp. 6A-7A.) The j.n.o.v. was held proper.

The claim of an alleged "quota system" was not even made at that first trial, when punitive damages were awarded. Only at the second trial did petitioner seek "to

base his entire claim on the evolution and use of a quota system." (Petitioner's Appendix A, p. 2A.) That second trial resulted in a defense judgment. (Petitioner's Appendix A, p. 2A.) Without any award in his favor at the second trial, petitioner cannot argue that he was entitled to punitive damages.

b. *Evidentiary ruling*

Petitioner next argues that he was prejudiced by the district court's refusal to permit him to introduce evidence concerning a "1974 quota system." (Petition for Writ of Certiorari, p. 19.) Mr. Mitchell is obviously referring to the Home Town Plan, which he claims Rudolph/Libbe established in 1974. (Petition for Writ of Certiorari, p. 2.)

At the second trial, the district court ruled that evidence relating to petitioner's damages was to be limited to the period of time from 1978, six years before the complaint was filed against respondent, *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 522 (6th Cir. 1975), until the time of trial. That limitation was only as to evidence of damages. The trial court did, however, permit evidence relating to the period of time prior to 1978 to show respondent's alleged intent to discriminate. (Petitioner's Appendix A, pp. 8A-9A.)

> Appellant could recover for injuries sustained after and including 1978, six years prior to his complaint's filing. At trial, the court allowed testimony of all of appellant's contacts with Rudolph/Libbe, namely his alleged first application and employment in 1978. It allowed

> testimony regarding the Toledo Area Affirmative Action Program for Construction Industry and Frederick Rudolph's role in its establishment. * * *

(Petitioner's Appendix A, p. 9A.) The Court of Appeals, citing to Fed. R. Evid. 401, simply found no error in this evidentiary ruling challenged by petitioner. (Petitioner's Appendix A, p. 9A.)

Petitioner does not even attempt to show that the Sixth Circuit's decision conflicts with the decision of another federal court of appeals, calls for the exercise of this Court's power of supervision, requires an important question of federal law to be settled by this Court, or otherwise meets the considerations governing review by certiorari by this Court.

c. *Jury instructions*

Mr. Mitchell's next "argument" is that this Court should review the Sixth Circuit's opinion upholding the district court's decision to not give two jury instructions requested by Mr. Mitchell. (Petition for Writ of Certiorari, p. 20.) The first of those two instructions related to proof of intentional discrimination and the second was an instruction about racial quotas. (*See* Petitioner's Appendix E, pp. 1E-2E.) The district court decided not to give either of the two requested instructions. The Sixth Circuit agreed with the district court, stating:

> The requested instructions were not significantly different from those given and the district court was not in error in rejecting them. In effect, [petitioner] sought instructions that

> argued his facts for him. [Respondent] was entitled to instructions that stated that it would not be liable if [petitioner] was not hired for "legitimate nondiscriminatory reasons." *See Price Waterhouse v. Hopkins,* 109 S. Ct. 1775, 1786 (1989) (plurality opinion).

(Petitioner's Appendix A, p. 8A.)

There is no reason for this Court to review the decision regarding jury instructions. That decision was consistent with this Court's and the federal courts of appeals' decisions regarding the burden of proof in a race discrimination in employment case under Section 1981.

d. *New trial*

Mitchell's final "argument" is that he was prejudiced when the second trial was on both liability and damages, and not limited to the issue of damages. (Petition for Writ of Certiorari, pp. 20-21.) The decision to grant a new trial on rejection of the remittitur was made because the $10,000 compensatory damages verdict was against the clear weight of the evidence: Mr. Mitchell's evidence showed, at best, two weeks' lost wages of $752 per week and the evidence concerning emotional distress did not meet the specificity required by *Carey v. Piphus,* 435 U.S. 247 (1978), and by *Rodgers v. Fisher Body Division, General Motors Corp.,* 739 F.2d 1102 (6th Cir. 1984). (Petitioner's Appendix C, pp. 4C-5C.)

Applying the accepted abuse of discretion standard to the decision to grant a new trial or request the filing of a remittitur, the Sixth Circuit Court of Appeals upheld that decision. (Petitioner's Appendix A, pp. 3A-5A.) The Sixth Circuit's opinion contains the following footnote:

> Conditioning a new trial with a remittitur is not a concession by the trial court that the liability issue is unassailable so that the new trial must be on damages only. The practice of a new trial conditioned on rejection of a remittitur is well established. *See* 11 *C. WRIGHT & A. MILLER, FED. PRAC. & PRO.* section 2815, at 100.

(Petitioner's Appendix A, p. 5A.)

Petitioner states no policy reason from Supreme Court Rule 17 for review on writ of certiorari of these issues concerning evidence, motions, and jury instructions. Because accepted legal standards were applied in deciding on these issues, this Court should decline review.

CONCLUSION

The petition for a writ of certiorari of petitioner James A. Mitchell, Jr. should be denied.

Respectfully submitted,

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